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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

H. B. NELSON CONSTRUCTION COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR REHEARING.

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Dated: March , 1941.

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petition for Rehearing.

Comes now the above named petitioner, Nelson Construction Company, and presents this its petition for a rehearing on its application for a writ of certiorari to review the judgment of the Court of Claims in the above entitled cause. Petitioner's application for such writ was denied by this Court on March 3, 1941.

Ground for Rehearing.

This petition for a rehearing is filed under Rule 33 of this Court.

The primary ground for this petition is the departure by the Court of Claims from the accepted and usual course of judicial proceedings within the meaning of Rules 41 and 38, subdivision 5, of this Court,

in failing to make findings of fact on the material issues which, uncorrected, would deny a judgment required by uncontradicted and sufficient evidence, in conflict with the decisions of the Court of Claims, of this Court, and of the various Federal Circuit Courts of Appeal, and the Fifth Amendment to the Constitution evidenced by the facts that:

1. The Court of Claims based its decision entirely upon the erroneous theory that petitioner's claim for damages for respondent's breach of contract, misrepresentations, concealments, failure to disclose material facts, and for work required and delays due to conditions not contemplated under the contract, is controlled by the provisions of the contract.

2. Because of its reliance upon such provisions, the Court of Claims did not concern itself with what are conceded by respondent's counsel in his brief to be the undisputed facts of the case as set out in the Petition and Brief, pages 2-11, material to the problem involved.

3. The Court of Claims failed to make special findings of facts, on undisputed facts, requested by petitioner, which it was required to make under Rule 41 and the decisions of this Court, the Act of May 22, 1939, C. 140, 53 Stat. 752, Sec. 288, Title 28 U. S. C. A. and the Fifth Amendment to the Constitution. (Spec. of Errors, ps. 11-19).

4. The result reached by the Court of Claims cannot be reconciled with or sustained by the admitted facts which clearly entitle petitioner to the recovery

asked for under the decisions of this Court, the Court of Claims and the Circuit Courts of the United States. (Petitioner's Petition and Brief, ps. 21-24, 27-42).

I.

The Court of Claims did not complete the trial of this case, but left it undetermined: It did not make findings on any of the issues described below, each of which is highly important.

(a) The Court below refused to find the following undisputed facts:

(1) That there were culverts over the main ditch which were both inadequate and improperly constructed in that the base of the culverts was higher than the bottom of the ditch and above the surface of the adjacent ground, (R. 22, 26, 31).

(2) That because the culverts were of inadequate size, and improperly constructed in the base being above the bottom of the ditch and the surface of the adjacent ground, it backed up the water and hindered drainage of the site, and caused floods (R. 24-26); water remained two feet above the ground 12 hours after a rain (Davies, R. 26, 29), and it rained 14 days in each of the months of August and September, 26 days in October, and 27 days in November (Deft's. Ex. Y*); it was necessary to use pumps 2086 hours,—260 eight-hour days (Deft's Ex. Y; Fogg R. 37); the work was impeded, hindered, and delayed through the floods, making it almost impossible, as the men would be up to their waists in mud (R. 25, 26), making ma-

*The exhibits referred to are on file with the Clerk of this Court

chine work impossible, and making it necessary to do the work by hand (R. *Id.*, 28; Specification of Errors 10, 17-b).

(3) That petitioner expended in doing the work $67,996.38 (R. 27; Plf's. Ex. 7).

(4) That the increase in cost over the contract price of $53,071.42 (as modified by the change orders), (R. 17), was $14,924,96, which, with a 10% profit amounting to $6,799.64, and 1½% for the bond amounting to $1,121.94, makes a total of $26,796.54, (R. 27; Plf's. Ex. 7), petitioner's total loss and the amount unpaid and due him.

(5) That no proof was offered that any of petitioner's expenditures were extravagant or unnecessary.

(6) That,—(because of the foregoing undisputed circumstantial facts, and the fact found by the Court below that respondent agreed "that no artificial obstructions will be encountered," (Finding 3, ps. 12, 13), petitioner is entitled, under this Court's Rule 41, to a finding of the ultimate fact),—the inadequate and improperly constructed culverts were artificial obstructions which were encountered by petitioner in doing the work in violation of respondent's agreement, (Sec. 2-01, Specifications p. 7, R. 13).

(7) It was necessary that the Court make the above described findings, as through them petitioner becomes entitled to recover the $26,796.54, the extra cost and a profit, because of respondent's breach of its contract that petitioner would not encounter any artificial obstructions.

The word "encountered" is broad and general and includes the effect of the culverts through backing up the waters and flooding the site. It is not limited to actual contact with the culverts.

> "* * * had they" (the parties) "intended to so restrict" (the provision) "* * * it is to be presumed that language appropriate to the * * * limitation * * * would have been used. This was not done and the language actually employed must be given effect according to its obvious meaning, unaided by an implication of provisions which might have been, but were not, included." (Hunt v. Triplex Safety Glass Co. of S. A. 60 F. (2d) 92, 94).
>
> (See argument and authorities ps. 4 and 5 Reply Brief, and p. 29 of the original brief).

(b) The Court below refused to find the following undisputed facts:

(1) That respondent's representative, Commander Fogg, assured the bidders that the Panama Canal was extending its drainage system in the site (R. 36, 43), and respondent exhibited to petitioner a map showing drains there, (Plf's. Ex. 5; Deft's. Ex. T; R. 38).

(2) That the obvious purpose of said assurance was to induce petitioner to believe that the drainage system would be adequate.

(3) That,—(as the Court below found that *"There were drainage ditches * * * but their effect on the subsoil was not apparent"* on the inspection trip, (Finding 4, R. 15), and that the work took a longer

time because *of "the lack of drainage, the wet, marshy condition of the subsoil, and the miring of excavating or pile driving equipment"* (Finding 6, R. 16), and because of the above circumstantial facts),—petitioner is entitled to the ultimate findings,—That he was misled by drains appearing on the map, and on inspection of the site, and through Fogg's assurance, and through the effect of the ditches on the subsoil not being apparent, (as the Court found) into the belief that and had the right to assume that the ditches would be adequate to and would drain the site.

That it was necessary that the above circumstantial and ultimate findings be made, as because of them petitioner became entitled to recover his damages. (Horgan v. The Mayor, 160 N. Y. 516, 522, 523, quoted in the original brief, ps. 29 and 30; Sacramento Navigation Co. v. Salz, 273 U. S. 326, 329; General Fireproofing Co. v. L. Wallace & Son, 175 F. 650, 657, Certiorari denied 217 U. S. 607).

(c) The Court below refused to find the following facts, all of which are undisputed, except where stated otherwise:

(1) Before the making of the contract, respondent exhibited to petitioner a map which did not show the site to be swampy, although it had made and had a map showing the swampy condition. (Plf's. Exs. 5, 6; R. 24).

(2) In said map there appeared drains, and Commander Fogg, respondent's officer in charge, assured petitioner that the drainage system was being extended. (Plf's. Ex. 5; Defts.' Ex. T; R. 38; 36, 43).

(3) Respondent made only punch rod sounding, which (as is obvious and as is proven by the fact that over half of the lengths of piles had to be changed from the specifications), are inadequate, yet respondent by presenting them represented, contrary to the fact, that it had made sufficient subsoil explorations, and that these soundings showed the nature and bearing strength of the soil. (Plf's. Brief p. 33).

(4) Fogg, respondent's officer in charge, had been over the site a number of times, and was familiar with its nature and knew that it was a marsh, through which drainage ditches ran to take off storm water but that there were not enough of them to remove the water that soaked into the soil, and that the ditches were designed to release flood waters and prevent slides,—not to drain the site (R. 40), yet *he ventured no information as to the adequacy of the ditches* (R. 39).

(Note: While Fogg also stated that he gave bidders as full information as he could, he did not deny his testimony as stated above, and it is not to be assumed that he intended to do so by this general statement. Moreover, he was interested and peculiarly familiar with the facts, and the view of his testimony least favorable to respondent should be taken, (20 Am. Jur. §1182; Jones on Ev. 4th Ed. §857, p. 1590).)

(5) The site, when the inspection trip was made, was covered with guinea grass 6 to 8 feet high, so dense that you would get lost if you tried to go any distance off the trail, and, so, a trail had to be cut for the inspection trip (R. 35, 42). The party skirted around the edge of the swamp in which the site was located (R. 42, 43).

(6) The officer in charge told the bidders that the main new drainage ditch was put in for drainage of the area, and would be adequate to take care of the water, and other lateral drainage ditches were now being opened * * * which would take care of the water conditions (R. 23, 25).

(Note: Gillogly, petitioner's employee at the time, but when he testified not an employee and disinterested, swore to the facts in No. (6). Fogg denies this, but he made many contradictory statements and statements as though he had seen certain occurrences, despite his admission later that he was not present, to matters with which he could not have been familiar, and his testimony is not entitled to any weight. (His contradictions are covered in the original brief, ps. 31 and 32. See Hom Dong Wah v. Weedin, 24 F. (2d) 774, 775).)

(7) Because of proof of the above circumstantial facts, petitioner became entitled to the finding of the following ultimate facts necessarily inferred therefrom, viz.:

(A) From showing before the bid, the map from which the swampy conditions did not appear, and not that from which it did appear,—That respondent knew and concealed the swampy condition of the site.

(B) From showing the drains in the map, and the officer in charge stating that the drainage system was being extended, and from the fact that Fogg knew and testified that the drains were inadequate and not even designed to drain the site, but simply to carry off flood water, and prevent slides,—That respondent knew that the drains were inadequate and yet did not tell petitioner, but endeavored from what was said, to induce him to believe that they were adequate, and

thereby both concealed and misrepresented the facts and misled petitioner.

(C) From making only punch rod soundings and presenting them. That respondent knew that they were inadequate, and yet represented them as showing the subsoil conditions, which they did not show, and respondent thereby misrepresented the fact and misled petitioner.

(D) From skirting around the edge of the swamp in making the inspection trip,—That respondent endeavored to conceal, and did conceal, the swampy condition of the site.

(E) From the statement of the officer in charge that the drainage ditch would be adequate and that lateral ditches were being opened, which would take care of the water condition, contrary as Fogg knew to the fact,—That the conditions of the site were wholly misrepresented.

That all of these circumstantial and ultimate facts were material because they resulted in petitioner's being wholly misled as to the nature of the site, and prove also breaches of respondent's agreement that bidders "will be furnished with such additional information as is available by the local Government representatives," (Par. 7, Gen. Prvns., R. 14), and to his loss of the amount involved here, the particulars of which are stated hereinabove under (2) of (a) of this Point I. (See authorities cited p. 33 of the original brief).

(d) The Court refused to find the following undisputed facts:

(1) That 180 piles were driven. Their lengths were shown in the specifications, (Plf's. Ex. 2, Addendum 2, p. 1), but 91 were incorrect, necessitating exchanges between sites over ground so soft that mats had to be used (R. 25, 28, 31), trucks mired and had to be pulled out, and, at times, material had to be unloaded and carried by hand, (R. 25, 28) making the work difficult and expensive. New piles had to be ordered, causing a six week's delay (R. 25, 31), and into the extremely heavy rainy season (Deft's. Ex. Y, Oct. 7th to Dec. 1st).

(2) That,—(as the Court found *"longer piling than that estimated by the Government was found necessary at the locations for Towers 3, 5, and 6,—"* finding 5, R. 16,—*and those were all the towers where pilings were used,*—and because of the above circumstantial facts),—petitioner is entitled to the ultimate findings,—That there were material quantities of work resulting from the many changes, substantially variant in character from that contemplated by the parties when they made their agreement, which constituted new and different work which petitioner was required to do and did at an increased cost and taking a longer time; that the unstable condition of the subsoil was unforeseen by petitioner.

(3) These findings were material because they prove that the depth to which the subsoil was unstable was unforeseen, which entitled petitioner to recover his loss; and, also, prove that there were not alone changes in over half the piles, necessitating much ex-

tra work in itself, but that the transfers between sites were difficult and expensive, and that the delays in the arrival of the new piles continued the work into the heavy rainy season, when it was much more difficult, took much longer, and cost much more, which also entitled petitioner to recover his loss. (See authorities cited original brief, top of p. 34).

II.

Petitioner is entitled, as counsel believes, of right, to the material and controlling findings described under I hereinabove, under the decisions of this Court, a recent Act of Congress, and the Fifth Amendment to the Constitution.

(a) Petitioner, as appears above, proved without dispute, that he was entitled to recover on the issues involved, viz.:

(1) On breach of respondent's agreement that no artificial obstructions would be encountered;

(2) Because petitioner was misled by drains appearing on the map shown him, and on the inspection trip, and through Fogg's assurance as to them, and through the effect of the ditches on the subsoil not being apparent;

(3) Because of the concealments and misrepresentations as to the nature of the site, described hereinabove under (c) of Point I, and breaches of respondent's agreement that bidders "will be furnished with such additional information as is available by the Government representatives;" and

(4) Because of substantial and material changes in the nature of the work to be done, owing to unforeseen subsoil conditions.

With these many issues clearly established in petitioner's favor by uncontradicted evidence, the trial ended in an incomplete state,—no findings being made on any of the circumstantial or ultimate facts hereinabove described.

(b) This Court has uniformly held that a party is entitled to have findings made on all material issues, and has so held very recently in U. S. v. Esnault-Pelterie, 299 U. S. 201, 205. Such has been the ruling of this Court from the earliest days. (Mahan v. U. S. 14 Wall. 109-112).

(c) This Court, in U. S. v. Esnault-Pelterie, 303 U. S. 26, 32, held that it could not review the facts because the Record did not contain the evidence, due to

> "* * * the procedure * * * established by the Congress for the determination of claims against the United States,"

whereupon Congress passed the Act of May 22. 1939, §288, Title 28 USCA, providing that:

> "* * * the Supreme Court shall have authority to review" (when the evidence has been certified to it), "in addition to other questions of law, errors assigned to the effect that * * * there is a failure to make any findings of fact on the material issues."

Congress thereby agreed with the rule established by this Court that the right to the completion of a trial should remain sacred and inviolate.

This is true generally. How much more so here with undisputed evidence, yet no findings!

(d) Because of the establishing of each of the issues hereinabove described under (a) of this Point, petitioner became entitled to the extra cost, plus a profit, which is property, of which he will be deprived without due process of law, unless findings on these issues are made, and, so, a question is involved under the Fifth Amendment to the Constitution. (Fayerweather v. Ritch, 195 U. S. 276).

(e) On each of the many issues described under Point I, and under (a) of this Point, there is no possible defense to petitioner's recovery for the value of his work. Respondent sets up a release, but that it does not effect the claim for damages now urged is fully shown at pages 10, 11, 37 to 39 incl. of the original brief, and pages 5 and 6 of the Reply brief; and, besides, this Court holds that where, as here, respondent has been arbitrary to the extent even of withholding up petitioner's pay for months, the latter is not bound by the failure to except damages from a release given. (U. S. v. Smith, 256 U. S. 11, 16). Moreover, petitioner's claim for payment of the amount retained for liquidated damages was expressly excepted. So, as to it, the right to Certiorari can not on any sound ground be contested. (See petitioner's original brief, ps. 39 to 42 incl., and ps. 6 to 8 incl. of the Reply brief).

(f) This failure to make findings on the issues is the ground of this petition for rehearing, and because counsel feel that they may not have made this entirely clear, a rehearing is asked.

III.

(a) While petitioner did not urge it in his petition or briefs, and indeed it did not occur to him, is there not a grave public question in this case?

This Country is engaged in a herculean effort to prepare to defend itself against Foreign aggression. This necessitates efficiency and haste. It is in the hands of contractors,—manufacturers and builders. Success depends on them.

It is of vital importance to them to know that the Government can not violate its agreements as to conditions to be encountered, or as to furnishing the contractor available information, or conceal or misrepresent material facts, resulting in increased cost without being liable therefor, and the Nation is interested to have the best efforts of the contractors, undisturbed by worry whether they will be able to collect the amounts justly due them.

The right to a completed trial is fundamental and a basic one. The case at bar involves, as pointed out in the two preceding briefs, a conflict with all of the preceding cases on the issues involved. It is urged further that a grave question, of vital importance to the Nation, is also at stake, and that to sustain the judgment below, without findings of fact on the material issues, would deprive petitioner of his property without due process of law, (Fayerweather v. Ritch, *supra*).

For all the foregoing reasons and including those set forth in the Petition, Brief and Reply Brief, peti-

tioner urges that this petition for a rehearing and the writ of certiorari be granted.

Respectfully submitted,

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Dated: March 22, 1941.

Certificate of Counsel.

I, S. WALLACE DEMPSEY, one of counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

S. WALLACE DEMPSEY,
Counsel for Petitioner.